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OGC 76-6048

1 November 1976

PERS 26-3234

OGC Has Reviewed

MEMORANDUM FOR : Deputy Director of Personnel

STATINTL FROM : [redacted]
Assistant General Counsel

SUBJECT : Retroactive Temporary Promotions for Extended Details to Higher Grades: Claims of John F.

STATINTL [redacted]

STATINTL REFERENCES : a. Letter to D/Pers fm [redacted] Mar 76
b. Letter to D/Pers fm [redacted]
dtd 16 Mar 76
c. Letter to Chief, Retirement Affairs fm John F.
STATINTL [redacted] dtd 2 Apr 76
d. Memo to GC fm C/Transportation and Records Branch, O/P, dtd 7 May 76

1. You requested guidance in responding to the subject claims for
STATINTL compensation by Messrs. [redacted]. Please excuse the delay in responding to your request.

2. Each of these claims is based on two Comptroller General decisions (B-183086, 5 December 1975, and B-184990, 20 February 1976) which interpret Civil Service Commission (CSC) regulations as requiring that employees detailed to higher grade positions in excess of 120 days with no prior approval from the CSC be given retroactive temporary promotions and back pay for the period beyond 120 days for the difference between the compensation they received and the normal compensation of positions to which they were assigned. We have reviewed these decisions and the regulations and laws on which they are based, and it is our opinion that the decisions do not support the claims for compensation for the reasons that (1) the CSC regulations involved are not directly applicable to Agency employees; (2) the Agency has no regulations of its own which mandate procedures comparable to the CSC regulations; and, in any event, (3) it is uncertain whether retrospective relief in the form of back pay could be granted by the Agency in these circumstances.

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The Claims

STATINTL 3. Mr. [redacted] a former DDO employee and an Agency retiree since August 1974, claims to have been detailed to a GS-12 position during the period June 1968 to 1 April 1970. Mr. [redacted] STATINTL a current DDI employee, is a GS-13 who claims to have been assigned to a GS-14 slot since August 1973. Mr. [redacted] STATINTL another former DDO employee and an Agency retiree, claims to have been assigned to a GS-13 position during May 1967 through June 1970 while being paid at a GS-12 level.

4. The official personnel folders of the claimants, as interpreted by your office in Reference d., appear to indicate that the claimants were indeed assigned to or "detailed" to higher grade positions while continuing to be incumbent of the positions from which they were detailed. The record STATINTL shows that Mr. [redacted] was paid at a GS-11 level while occupying a GS-11 position from 1 March 1968 through 1 January 1969 but subsequently was assigned to a GS-12 position and held that position at least through STATINTL 1 April 1970. Mr. [redacted] was paid at a GS-13 level since 9 July 1971 but was assigned to a GS-14 position through 23 December 1975, when he was reassigned to a GS-13 position. Mr. [redacted] was paid at a GS-12 level STATINTL while occupying a GS-12 position during the period 9 June 1967 to 2 June 1968. On that date he was assigned to a GS-13 position, while continuing to be paid at a GS-12 rate, and remained in this assignment until 20 July, 1971. Of course, the official records, particularly with regard to STATINTL Mr. [redacted] may not reflect all component authorized details.

The Comptroller General Decisions

5. In Comp. Gen. decision No. B-183086 (5 December 1975), two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from the CSC. One employee had immediately assumed the duties of the higher grade position as he was obligated to do under his new position description and the other had been designated as "Acting"

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in the higher grade position. After the details were terminated and the employees reassumed the duties of their official positions, both employees filed a grievance and subsequently appealed to the CSC. Ultimately the CSC's Board of Appeals and Review (now redesignated as the Appeals Review Board) determined (1) that the Commission had jurisdiction to hear the complaints, and (2) that the CSC regulations regarding temporary promotions, taken together with others dealing with details to higher grade positions, were mandatory rather than discretionary as to details to higher grade positions extending beyond 120 days, and that, therefore, absent consent by the Commission to an extension beyond 120 days, (3) employees so detailed were entitled to temporary promotions. The Comptroller General, ruling on the "general principle of law that interpretations of regulations by the agency charged with their administration are entitled to be given great weight by a reviewing authority," upheld the determinations of the Board. The Comptroller General considered that the Board's decision, although novel, was a "clarification" rather than a substantive amendment of such regulations and overruled a previous Comp. Gen. decision, 52 Comp. Gen. 920 (1973), which interpreted the relevant regulations as being discretionary. Inasmuch as the employees had undergone an unjustified or unwarranted personnel action as a result of agency officials failing to comply with mandatory regulations, the Comptroller General held that they were entitled to back pay under the Back Pay Act of 1966, 5 U.S.C. §5596 (1970) and the Commission's implementing regulations contained in 5 CFR, part 550, subpart H. In passing, the Comptroller General noted that the Whitten Amendment, 5 U.S.C. §3101 which requires that an employee serve one year in the next lower grade before he is eligible for either a temporary or permanent promotion, posed no irreconcilable conflict with the Board's determination, since the Board "would have had authority to waive the time-in-grade requirements to avoid hardship or inequity if it chose to exercise its discretion to do so."

6. In Comp. Gen. decision No. B-184990 (20 February 1976), the Air Force detailed a GS-4 employee to a GS-5 position for over one year without obtaining the CSC's prior approval of extension beyond 120 days. The Comptroller General, relying on his decision in B-183086, determined that the Air Force should grant the employee a temporary promotion with back pay for the period beginning 121 days after her detail began. The Comptroller General, at p. 2 of his decision, stated that:

> Because our decision [in B-183086] was based on a clarification rather than a substantive amendment to CSC regulations governing employee details, the decision will be given retrospective as well as prospective application. Accordingly, the temporary promotion

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rule for details over 120 days is to be applied to any claim concerning this matter, provided the [CSC] detail regulations ... in effect at the time of the detail is [sic] substantially the same as in effect at the time of the CSC ruling. Also, the claim must be filed, within the 6-year period §71a (Supp. IV, 1974). Back pay claims involving extended details that we have previously considered and disallowed, may be resubmitted for reconsideration by this Office under the conditions stated in this decision.

7. Several subsequent decisions of the Comptroller General, issued early in 1976, are consistent with the principles expressed in B-183086 and B-184990. However, it has recently come to our attention that in light of recent Supreme Court cases, including United States v. Testan, which is discussed in this memorandum, the CSC is reconsidering its interpretation of the detail regulations upon which the Comptroller General decisions cited by claimants are based. I have been advised by legal counsel at GAO who were instrumental in forming the Comptroller General decisions at issue that, in light of this reconsideration, the Comptroller General has put a freeze on responding to additional claims based on those decisions until the Commission formally responds to a letter from the Comptroller General. Until the Comptroller General is provided with a formal reply, the legal effect of the decisions is at best uncertain.

The Applicability of CSC Regulations to CIA

8. The CSC regulations upon which the Comptroller General decisions are based include regulations from which CIA employees are specifically exempt. The CSC Appeals Board's decision which the Comptroller General approved in B-183086 recognized the discretionary power of agency officials to grant or not grant promotions, but reasoned that in view of CSC regulations dealing with details, which are found at FPM chapter 300, subchapter 8, that the "discretionary authority of an Agency official to grant a temporary promotion to an employee detailed to a higher grade position or to assign him to the position without a temporary promotion lasts, at most, for 120 days," see Board's slip opinion, p. 7, cited in B-183086 at p. 4. The Board quoted extensively from subchapter 8 entitled "Detail of Employees." Subparagraph 8-4c stated that:

> Details to higher grade positions. Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead. If a detail of more than 60 days is made to a higher position, or to a position with known promotion potential, it must be made under competitive promotion procedures. [emphasis supplied]

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Subparagraph 8-3(b)(2) states that:

> Since extended details also conflict with the principles of job evaluation, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained as provided in section 8-4f. All details to higher grade positions will be confined to a maximum initial period of 120 days plus one extension for a maximum of 120 days.

Subparagraph 8-4f states that:

> (1) When it is found that a detail will exceed 120 days, or when there is a question of the propriety of the detail, the agency must request prior approval of the Commission on Standard From 59. (Underscoring added.)

As a result of these provisions, the Board determined that what should have occurred is expressed in subparagraph 8-4e, as follows:

> Except for brief periods, an employee should not be detailed to perform work of higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead....

9. The present coverage of Subchapter 8, however, does not extend to employees of CIA. Coverage is expressly limited to details of employees serving in competitive positions or in positions under the General Schedule. Subparagraph 8-2 provides as follows:

> 8-2. Present Coverage of Subchapter. The material now covered in this subchapter related only to details within the same agency of employees serving in competitive positions or in positions under the General Schedule, without change in the employee's civil service or pay status. [Emphasis added.]

Agency employees do not serve in competitive positions or in positions under the General Schedule. "Competitive position" means a position in the competitive service, see e.g., §1.3 of E.O. 10577 (Nov 22, 1954). Sections 2102 and 2101 of Title 5, U.S.C define the "competitive service" to include all appointive positions in the executive branch except "positions which are specifically excepted from the competitive service by or under statute." Since CIA employees are appointed under the authority of Section 8(a) of the CIA Act, which authorizes expenditures for personal services

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notwithstanding "any other provisions of law," CIA positions are excluded from the competitive civil service.

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Agency Regulations

10. If, as has been shown, the CSC regulations upon which the recent Comptroller decisions were based are not directly applicable to CIA, the Agency need not award claimants retroactive temporary promotions unless the Agency's own regulations mandate such actions. In our opinion, they do not.

11. It is a general rule that personnel actions may not be effected retroactively so as to increase the right of an employee to compensation except (1) where through administrative or clerical error a personnel action was not effected as originally intended, (2) where an administrative error has deprived the employee of a right granted by statute or regulation, or (3) where nondiscretionary administrative regulations or policies have not been carried out, Comp. Gen. decision No. B-178156, 5 June 1973, citing B-172077, 7 April 1971, B-165125, 28 October 1968. The Comptroller General determined that the CSC detail regulations, read together, were nondiscretionary or mandatory with respect to periods longer than 120 days and so fell within the third exception.

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12. CIA personnel regulations, however, do not specifically provide for detail procedures comparable to those in Subchapter 8 of the Federal Personnel Manual on which the Comptroller General decisions are based. They do provide that, although as a matter of policy "[a]ssignments will normally be made to a position at the employee's grade," "an employee may be assigned [nevertheless] to a position of ....higher grade" and "may occupy a grade higher than his grade when (1) for training purposes the assignment is intended to afford the employee broader developmental opportunities in his career field; or (2) the employee is the best qualified person available at that time for the position," see [redacted] STATINTL.

13. It is advanced, however, by one of the claimants, that his claim is supported by Agency regulations "which make it clear that CIA personnel management procedures should adhere strongly to the concepts, spirit and principles of CSC regulations pertaining to personnel management," see Reference B. In support, he cites [redacted] STATINTL and [redacted] STATINTL. A close examination of these regulations shows, however, that they do not require adherence to all CSC regulations. [redacted] merely states that the principle of "[a]dherence to Federal personnel policies and statutory requirements applicable to Agency activities," personnel policies (emphasis added) will be applied by the Agency. [redacted] provides that STATINTL staff personnel "serve in an employment relationship which entitles them to normal benefits provided under general Federal law or regulation for appointed employees except as modified pursuant to laws applicable to the Agency." (emphasis added) [redacted] provides that Deputy Directors STATINTL will develop staffing complements, subject to appropriate review of Heads of Career Services and the Director of Personnel, which "identifies the positions to which ...personnel are assigned to carry out the assigned missions and functions of the component, the positions allocated to each element thereof (identified by type, grade, and career service), and the planned incumbency of each position. Not only do none of these regulations require compliance with the CSC regulations which are not legally applicable to the Agency, but further, as noted in paragraph 12 above, [redacted] STATINTL requires assignments at variance with CSC regulations.

14. [redacted] STATINTL provides that "[a]lthough specifically exempted from the provisions of the [Classification Act of 1949], the Agency has adopted the grade structure and pay scales provided therein and adheres to the basic philosophy and principles of the act in determining the appropriate salary rate for staff personnel assigned to General Schedule (GS) positions." [redacted] STATINTL provides that it is Agency policy to follow the concepts and principles of the Classification Act in setting up occupational categories and pay levels for Agency positions. The Classification Act does not address detail or promotion policies. Moreover, these regulations merely express a long-standing Agency policy of adhering to the provisions and principles of the Act insofar as practicable notwithstanding the fact that CIA is specifically exempt from its coverage. This policy originally found expression in correspondence between the Agency and the CSC in 1949. At that time, Director of Central Intelligence R. G. Hillenkoetter advised that:

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You may be assured that in our internal personnel administration we will be governed by the basic philosophy and principles of the Classification Act, the Civil Service Commission's allocation standards, the pay scales, the within-grade salary advancement plans, and the pay rules of the Classification Act, as they may be amended from time to time, in substantially the same manner as provided for other agencies.

More recently, in a memorandum of 8 October 1962, the Acting Director of Central Intelligence stated that:

> This memorandum will serve to reaffirm the existing policy that the Agency, insofar as practicable, will adhere to the compensation schedules and other provisions of the Classification Act of 1949, as amended, and as it may be amended hereafter, for all staff personnel of the Agency except as may be otherwise authorized by the Director of Central Intelligence. [emphasis added]
>
> Revision of the general compensation schedule, provisions for initial adjustment of salaries to such revised schedules, and other changes in the Classification Act will be given effect in the future by the Central Intelligence Agency whenever the law is amended. The effective date of such revisions and changes will be in accordance with the provisions of law making such changes.

15. Assignments of Agency employees to positions of higher grades for extended periods are not necessarily inconsistent with these expressions of Agency policy. As already described, the decisions of the Comptroller General upon which the present claimants rely are based, not on express provisions of the Classification Act or any other statute, but only on CSC detail regulations, which are expressly limited to employees serving in competitive positions or in positions under the General Schedule, and the Commission's interpretation of those regulations.

16. In any event, according to the record, each of the claimants has been compensated at GS levels appropriate to his capabilities and responsibilities.

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Under [redacted] "[a]n employee's official assignment to an authorized (planned) position means that he is (1) performing at his grade level the type of duties which are covered by the service designation and title of the position." According to CSC regulations (subpara. 8-1 of subchapter 8), moreover, a position is not technically filled by a detail, but rather the employee continues to be the incumbent of the position from which detailed. When and if an employee exhibits an ability to undertake increased responsibilities, he is promoted. The practical effect of extended assignments to higher grade positions is to provide an employee an opportunity to develop his capabilities and to give him "headroom" should those capabilities warrant promotion. CSC regulations, in this regard, provide that "[a] temporary promotion is not appropriate ... for training or evaluating an employee in a higher grade position," see subpara. 4-4, Chapter 335 of the Federal Personnel Manual.

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17. The Comptroller General has acknowledged the propriety of CIA's assignment policies. In a decision dating back to 1 December 1959 (B-140877), he held that mere adoption of the principles of the Classifiaction Act in the Agency's regulations, rules, and actions does not require, in light of the express exemption of CIA from the Act and its unique statutory authorities, that CIA follow 5 U.S.C. §38 (now §3341) which essentially limits details to 120 days. In that decision, an employee alleged that he had been compensated by CIA for a number of years at a GS-16 level whereas he had performed the responsibilities and duties of GS-17 and GS-18 positions which continued to exist during the period he had performed those duties, and that he was entitled to the difference in pay. The Comptroller General, in rejecting the claim, stated that since the record showed that irrespective of what may have verbally been told him by his superiors, his qualifications were considered under the regulations of the Agency and determined to be proper for grade GS-16... and that [he had] received compensation, for the period involved, at grade GS-16, the only grade [he] held officially during the period, [he had] no basis, upon the ... record; for allowing [his] claim." This decision has not been overruled.

18. Finally, it is significant that the Agency has never determined, directly or by implication from its practices, either prior or subsequent to the recent Comptroller General decisions, that its regulations require temporary promotions in the circumstances alleged by the present claimants. As the Comptroller General acknowledges, the interpretation of regulations by an Agency charged with their administration is entitled to be given great weight.

Retroactive Pay Increases

19. If the claimants are not entitled to retroactive temporary promotions under Agency regulations, then the claimants would not be entitled to back pay on the basis of the Comptroller General decisions under discussion. Moreover, even were it determined that such retroactive promotions were appropriate, it is doubtful whether the Agency has the requisite authority to grant such make-whole remedies as awarding back pay, and in any event would be entitled to delay implementation of the award until such time as the Agency receives an advance decision from the Comptroller General as to whether the awards are in conformance with the requirements of law. In 1951, for example, when the Agency sought approval of the Comptroller General to grant retroactive pay increases equivalent to increases in salaries paid classified employees under the Classification Act, the Comptroller General

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in B-106516, 21 November 1951, held that, despite "an administrative policy of adherence to the provisions of the Classification Act" as described in correspondence between the Agency and CSC in 1949 (see para. 12 above), retroactive pay increases in CIA salaries would not be expenditures "necessary to carry out its functions" within the meaning of what is now section 8(a) of the CIA Act of 1949, and therefore "would be subject to legal objection. In 1964, in another Comptroller General decision, B-106516, 20 August, it was held that the Agency could make adjustments in salaries to parallel statutory increases with respect to classified employees, specifically citing a change in Agency policy as reflected in 1962 memorandum, see para. 13 above. The 1964 decision, however, did not overrule the general principle of the 1951 decision but merely distinguished it, holding that the new expressed policy of the Agency of giving effect to future revisions of the general compensation schedules was not inconsistent with the general rule against retroactive compensation.

20. Nor does the Back Pay Act, 5 U.S.C. §5596 assuming arguendo that it is applicable to Agency personnel actions, compel a contrary conclusion. The Act authorizes retroactive recovery of wages whenever a Federal employee "is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of the compensation" to which the employee is otherwise entitled. The Back Pay Act, however, does not create a substantive right to back pay in itself and if claimants are not entitled to compensation under the CSC regulations or under Agency regulations, the Back Pay Act is inapplicable. This point is emphasized in a recent Supreme Court decision, United States v. Testan, 47 L. Ed. 2d 114 (March 2, 1976). In that case two GS-13 Government trial attorneys sued in the Court of Claims to compel the CSC to reclassify their positions to grade GS-14, contending that their duties and responsiblities met the requirements of the higher grade and were identical to those of other trial attorneys classified as GS-14 in another agency, and that under the principle of "equal pay for substantially equal work" prescribed in the Classification Act, they were entitled to the higher classification. Each attorney also sought back pay for the period subsequent to the initial denial of their agency for reclassification. The Supreme Court, in rejecting the claims, held that neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to back pay for the period of their claimed wrongful classifications. The Court at 125 and 126 analyzed the Back Pay as follows:

> [The Back Pay Act] ... does not apply, in our view, to wrongful classification claims....The statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, and suspensions, and "other unwarranted or unjustified

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actions affecting pay or allowances [that] could occur in the course of reassignments and change from full-time to part-time work. [citations omitted]

* * * *

For many years federal personnel actions were viewed as entirely discretionary and therefore not subject to any judicial review, and in the absence of a statute eliminating that discretion, courts refused to intervene where an employee claimed that he had been wrongfully discharged. [citations omitted] Relief was invaribly denied where the claim was that the employee had been denied a promotion on improper grounds [citations omitted]

Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U.S.C. §7501 [a statute which applies only to personnel in the competitive service], for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay. But federal agencies continue to have discretion in determining most matters relating to the terms and conditions of federal employment. One continuing aspect of this is the rule, mentioned above, that the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from it with its enactment of the Back Pay Act. It could easily have so provided had that been its intention.

Conclusions and Recommendations

21. In conclusion, it is our opinion that your office should reject each of the claims for the reasons discussed in this memorandum, at least insofar as they are based on the two Comptroller General decisions which are cited. We suggest, however, that you review and determine to your satisfaction that each of the claimants was indeed "detailed" to higher grade positions for periods beyond 120 days. At the same time you might check to see whether through administrative or clerical error a promotion to which any of the claimants was entitled during the periods of extended details was not effected as originally intended before you make your final decision.

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22. If you confirm (1) that the claimants were indeed detailed to higher grade positions for extended periods; (2) that there is no evidence that any of the claimants had been denied promotions through administrative or clerical error; and (3) that these details were in fact consistent with Agency policy regarding internal details, you should deny each claim and inform claimants that the Comptroller General decisions are inapplicable to Agency personnel. Further it should be suggested that the claimant, if still dissatisfied, may submit an appeal through the Inspector General, to the DCI, according to the grievance procedure in

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[redacted] STATINTL

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